



## DEPARTMENT OF THE TREASURY

### Office of Investment Security

#### 31 CFR Parts 800 and 802

#### Certain Investments in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Real Estate in the United States

**AGENCY:** Office of Investment Security, Department of the Treasury.

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts without change the proposed rule modifying the definitions of “excepted foreign state” and “excepted real estate foreign state” by extending by one year the effective date of one of two criteria set forth in the definitions in the regulations implementing certain provisions of Section 721 of the Defense Production Act of 1950, as amended.

**DATES:** This final rule is effective on February 4, 2022.

**FOR FURTHER INFORMATION CONTACT:** For questions about this rule, contact: Laura Black, Director of Investment Security Policy and International Relations, Meena R. Sharma, Deputy Director of Investment Security Policy and International Relations, or Richard Rowe, Senior Policy Advisor, at U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington, DC 20220; telephone: (202) 622-3425; email: [CFIUS.FIRRMA@treasury.gov](mailto:CFIUS.FIRRMA@treasury.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

##### *A. Definitions of Excepted Foreign State and Excepted Real Estate Foreign State – Sections 800.218 and 802.214*

On November 15, 2021, the Department of the Treasury (Treasury Department) published a proposed rule amending the definitions of “excepted foreign state” and “excepted real estate foreign state” in 31 CFR part 800 and 31 CFR part 802, respectively. 86 FR 62978. These terms operate together with other relevant terms to provide an exception from the

jurisdiction of the Committee on Foreign Investment in the United States (CFIUS or the Committee) over covered investments by certain foreign persons who meet specific criteria establishing sufficiently close ties to certain foreign states, as well as certain other provisions of the Foreign Investment Risk Review Modernization Act of 2018.

The preamble to the proposed rule provides background on CFIUS's statutory authority and the rationale for these definitional changes. The public was provided an opportunity to comment on the proposed rule and comments were due by December 10, 2021. The Treasury Department received two comments prior to the deadline, which are described in the next section.

#### *B. Excepted Foreign States and Excepted Real Estate Foreign States*

As described in the preamble to the proposed rule, “excepted foreign state” and “excepted real estate foreign state” are each defined by a two-criteria conjunctive test, with delayed effectiveness for the second criterion. This second criterion is a Committee determination under § 800.1001(a) for each eligible foreign state that it has established and “is effectively utilizing” a robust process to analyze foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security, and a Committee determination under § 802.1001(a) for each eligible foreign state that it has “made significant progress” toward establishing and effectively utilizing the robust process that is described in § 800.1001. The final rule extends the effectiveness of the second criterion with respect to each definition. Instead of becoming effective on February 13, 2022, each such second criterion will become effective on February 13, 2023.

## **II. Summary of Comments**

During the public comment period, the Treasury Department received two comments to the proposed rule. The Treasury Department considered each submitted comment. All comments received by the end of the comment period are available on the public rulemaking docket at <https://www.regulations.gov> and addressed herein.

One comment supported the proposed rule and asked whether foreign states understand the determination criteria set forth in § 802.1001(a). The Treasury Department notes that there is additional information with respect to the factors that the Committee will consider in making determinations under §§ 800.1001(a) and 802.1001(a) on its website, available at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states>. The public disclosure of the factors that CFIUS will consider in its determinations is informative to foreign states of the progress needed to meet the definitions of excepted foreign state and excepted real estate foreign state. CFIUS also engages with foreign counterparts on investment screening issues.

Another comment asked about the impact of the pandemic and the excepted foreign state determinations. Extending the effective date of the second criterion in each definition provides foreign states with additional time to meet the determination factors. As stated in the preamble to the proposed rule, the Committee had determined that extending the time period before which such requirements become applicable is desirable given certain ongoing changes to foreign investment review regimes. The proposed rule does not make any change to the two-part conjunctive tests or to the factors set forth under §§ 800.1001(a) and 802.1001(a) for the second criterion. These tests and factors continue to provide the basis for CFIUS to designate excepted foreign states and excepted real estate foreign states.

Upon review and consideration of these comments, the Treasury Department has determined that the proposed rule is desirable given certain ongoing changes to foreign investment review regimes. The final rule therefore adopts the proposed rule without change.

### **III. Rulemaking Requirements**

#### **Executive Order 12866**

These regulations are not subject to the general requirements of Executive Order 12866, which covers review of regulations by the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB), because they relate to a foreign affairs function of

the United States, pursuant to section 3(d)(2) of that order. In addition, these regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to section 7(c) of the April 11, 2018, Memorandum of Agreement between the Treasury Department and OMB, which states that CFIUS regulations are not subject to OMB's standard centralized review process under Executive Order 12866.

### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, RFA) generally requires an agency to prepare a regulatory flexibility analysis unless the agency certifies that the rule will not, once implemented, have a significant economic impact on a substantial number of small entities. The final rule extends the delayed effectiveness period for the second criterion in each of 31 CFR part 800 and 31 CFR part 802 without making any change to the two-criteria conjunctive test in either the definition of excepted foreign state or excepted real estate foreign state. The final rule therefore does not change the circumstances of any investor. Both before and after the final rule's effectiveness, any investor with sufficiently close ties to an eligible foreign state may be excepted from certain aspects of CFIUS's jurisdiction, including if engaging in a transaction with a small business. Such exception would be expected to lessen the burden on any such small business. The final rule therefore does not impose any additional burden on potential filers, including small businesses. Considering the foregoing, the Secretary of the Treasury certifies, pursuant to 5 U.S.C. 605(b), that this final rule will not have a significant economic impact on a substantial number of small entities.

### **Congressional Review Act**

This rule has been submitted to the Office of Information and Regulatory Affairs (OIRA), which has determined that the rule is not a "major" rule under the Congressional Review Act.

### **List of Subjects**

#### *31 CFR Part 800*

Foreign investments in the United States, Investments.

Real estate transactions in the United States, Investments.

For the reasons set forth in the preamble, the Treasury Department amends 31 CFR parts 800 and 802 regarding the definition of excepted foreign state and excepted real estate foreign state as follows:

**PART 800—REGULATIONS PERTAINING TO CERTAIN INVESTMENTS IN THE UNITED STATES BY FOREIGN PERSONS**

1. The authority citation for part 800 continues to read:

**Authority:** 50 U.S.C. 4565; E.O. 11858, as amended, 73 FR 4677.

**Subpart B—Definitions**

**§ 800.218 [Amended]**

2. Amend § 800.218 introductory text by removing the year “2022” wherever it appears and adding in its place “2023”.

**PART 802—REGULATIONS PERTAINING TO CERTAIN TRANSACTIONS BY FOREIGN PERSONS INVOLVING REAL ESTATE IN THE UNITED STATES**

3. The authority citation for part 802 continues to read:

**Authority:** 50 U.S.C. 4565; E.O. 11858, as amended, 73 FR 4677.

**Subpart B—Definitions**

**§ 802.214 [Amended]**

4. Amend § 802.214 introductory text by removing the year “2022” wherever it appears and adding in its place “2023”.

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**Larry McDonald,**

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